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No. ~~100~~ 10

In The

Supreme Court of the United States

October Term 1953

The United States of America, *Petitioner*

v.

Olympic Radio and Television, Inc., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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Fred R. Tansill

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INDEX

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OPINIONS BELOW

The opinion of the Court of Claims on plaintiff's and defendant's motions for summary judgment, and the dissenting opinions were entered November 4, 1952. Judgment was entered the same day. (R. 10-14). These opinions are reported at 108 F. Supp. 109. The opinion of the Court of Claims denying defendant's motion for rehearing, and the dissenting opinions were entered March 3, 1953. (R. 16-19). These opinions are reported at 110 F. Supp. 600.

JURISDICTION

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, the Government filed a motion for rehearing. On March 3, 1953, the court denied the motion. (R. 19.) On May 29, 1953, application for *writ of certiorari* was filed by the petitioner. Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Section 1255 (1). The respondent contends that jurisdiction does not lie in this proceeding for failure to file a timely petition within the meaning of 28 U.S.C., Section 2101 (c).

QUESTIONS PRESENTED

1. Was the petition for a *writ of certiorari* timely filed?

2. Did the Court of Claims err in construing the intent of Congress to be that the phrase "paid or accrued", appearing in Section 122(d)(6) of the Internal Revenue Code, did not refer to methods of accounting and, therefore, permits an accrual basis taxpayer to take as a deduction the amount of excess profits tax paid in 1946 in computing the net operating loss for that year?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code here applicable, are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

This case was submitted to the Court of Claims on motions for summary judgment filed by both parties, together with supporting affidavits. The undisputed facts are briefly as follows:

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The taxpayer, a New York Corporation, was and is a manufacturer of television and radio receiving sets, with its office and principal place of business at 34-01 38th Avenue, Long Island City, New York. Plaintiff kept its books and accounts on the accrual basis and filed its Federal corporation tax returns on the same basis using a calendar year (R. 1).

The taxpayer's Federal corporation income tax return, filed for the calendar year 1946, disclosed no income tax liability and reflected a net operating loss for the year 1946 of $324,844.23. Upon audit of this tax return, the Bureau of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60, to which the taxpayer agreed. The latter amount neither included nor reflected any adjustment or addition on account of excess profits taxes paid by the taxpayer to the Collector of Internal Revenue in 1946, within the meaning of 122(d)(6) of the Internal Revenue Code. (R. 2, 11.)

Within the calendar year 1946, taxpayer paid a total of $263,272.80 in excess profits taxes to the Collector of Internal Revenue. (R. 2.)

On or about June 11, 1948, taxpayer filed a claim for refund of income and excess profits taxes for the year 1944 with the Collector of Internal Revenue, said claim being in the face amount of $191,004.04. That refund claim was based upon the provisions of Section 122(d)(6) of the Internal Revenue Code, and asserted the taxpayer's right, in computing the correct net operating loss for 1946, to include the sum of excess profits taxes actually paid by the taxpayer to the Collector of Internal Revenue within 1946. (R. 2, 3, 11.)

Upon the failure of the Collector of Internal Revenue to take any action with respect to said refund claim within six months after the filing of said claim, the tax-

payer filed petition in the United States Court of Claims on June 14, 1952 (R. 1-3).

On November 4, 1952, the Court of Claims promulgated its opinion granting the taxpayer's motion for summary judgment, and denying the defendant's motion for summary judgment. Judgment was thereupon entered on the same day in the taxpayer's favor in the sum of $148,-841.72, with interest as provided by law. The opinion of the Court of Claims held that the taxpayer was entitled to include as a deduction in computing its 1946 net operating loss, the amount of excess profits taxes paid in 1946 under the provisions of Section 122(d)(6) of the Internal Revenue Code. (R. 10-14.)

REASONS FOR DENYING THE WRIT

The respondent advances the following contentions as reasons for denying the writ: 1) the petition for *writ of certiorari* was not timely filed; 2) the decision below is clearly correct; 3) there is no conflict of decision; and 4) there is no important issue involved.

I

PETITION FOR A WRIT OF CERTIORARI WAS NOT TIMELY FILED

The issue of timeliness of a petition for *certiorari* is not a new one in this Court. A recent decision of this Court, *Federal Trade Commission v. Minneapolis Honeywell Regulator Company*, (1952) 344 U. S. 205, contains a pertinent discussion of this problem by the Chief Justice.

After observing that the petitioner's interpretation of this Court's prior decisions was too liberal, the Chief Justice stated:

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"While it may be true that the Court of Appeals had the power to supersede the judgment of July 5, with a new one, it is also true, as that court itself has recognized, that the time within which a losing party must seek review, cannot be enlarged just because the lower court in its decision thinks it should be enlarged. Thus the mere fact that a judgment previously entered, has been re-entered or revised in an immaterial way, does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered, should the period within which an appeal must be taken, or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order has disturbed or revised legal rights and obligations, which by its prior judgment had been plainly and properly settled with finality."

The opinion in the cited case, closes with the admonition to heed the principle that "litigation must at some definite point be brought to an end."

Applying the principles just stated to the present proceeding, the opinion of the Court of Claims was rendered on November 4, 1952. On that date judgment was also entered, as ordered, in the plaintiff's favor against the defendant in the amount of \$148,871.72, with interest. That opinion and decision is the one from which the petitioner here seeks to appeal. On December 3, 1952, the defendant below filed motion for re-hearing with the Court of Claims. That motion was opposed by the plaintiff below, in part based upon the averment that the defendant's brief in support of its motion for re-hearing failed to advance any significantly new and different arguments from those already presented to the Court of Claims.

On February 3, 1953, the motion for re-hearing was argued. On March 3, 1953, the Court of Claims rendered its opinion on defendant's motion for re-hearing. That

opinion concluded with the statement "The judgment heretofore entered in the sum of $148,841.72 will stand."

A reading of the opinion of March 3, 1953, discloses that it is confined to the very narrow question of whether or not the distinction which had been made by the taxpayer between Section 710(a)(1)(B) and Section 710(a)(1)(A) was valid. The same point had been argued in the original briefs, and reply briefs in the Court of Claims proceeding, and also had been raised during oral argument. While it is true that the opinion of the Court of Claims of November 4, 1952, is silent on this matter and that its opinion of March 3, 1953, treats it in detail, the fact remains that the opinion of March 3, 1953, does *not* "change matters of substance." Nor does it resolve a genuine ambiguity. It is obvious that the Court of Claims' second opinion, neither disturbed nor revised any legal rights or obligations, settled by its prior opinion and judgment. See also *Department of Banking v. Pink*, (1952) 317 U.S. 264.

The principle enunciated in *Federal Trade Commission v. Minneapolis Honeywell Regulator Company, supra,* should apply in this instance. The 90-day period within which the defendant below could have applied for a *writ of certiorari* expired on February 2, 1953. 28 U.S.C. Sec. 2101(c). Petition for *writ of certiorari* was filed on May 29, 1953.

Recognition of the respondent's argument on this point would not mean that a losing party in the Court of Claims, in a situation such as this would be left without a remedy. The defendant below could have applied for an extension of time from a Judge of this Court, 28 U.S.C., Sec. 2101(c), or it could have filed a timely petition for a *writ of certiorari* as a protective measure.

The fact that the application for *certiorari* under consideration was filed on May 29, 1953, requires the conclusion that such application was not timely filed.

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II

DECISION BELOW IS CLEARLY CORRECT

The Court of Claims proceeding involving this taxpayer presented a novel tax issue to that court. At the nub of the problem presented, was the necessity of construing the phrase "paid or accrued", appearing in Section 122 (d)(6) of the Internal Revenue Code. The taxpayer contended that these words should receive their usual commercial sense.[1] That is, "paid" meant liquidation of an outstanding tax liability by actual payment and "accrued" meant the coming into existence of such a liability. The respondent below contended that these words referred to methods of accounting. The Court of Claims accepted the former contention and found for the taxpayer.

Three fundamental lines of reasoning support the result reached by the Court of Claims. These are: First, the legislative antecedents and history of Section 122(d)(6) lead to that conclusion; second, the same result has been reached in an analogous situation[1]; and third, the contention of the defendant below leads to such incongruous and inequitable results that such results could not have been intended by Congress.

With reference to the first proposition, Section 122(d)(6) was inserted in the Internal Revenue Code by Section 105(c)(3) of the 1942 Revenue Act. It was made effective for taxable years beginning after December 31, 1941.

In 1940, Section 23(c) of the Internal Revenue Code as it then read, permitted a direct deduction against net income for taxes paid or accrued within the taxable year, with certain exceptions. Included among those exceptions, were excess profits taxes. Section 202(a) of the

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[1] See *Commissioner v. Clarion Oil Company,* (CCA DC 1945), 148 F. (2d) 671, cert. den. 325 U.S. 881.

Revenue Act of 1941, removed excess profits taxes under Chapter 2E, from the list of exceptions to the general deduction rule contained in Section 23(c) of the Code. Simultaneously, the Revenue Act of 1941 added new subparagraph (2) to Section 23(c), which permitted a direct deduction in computing net income for excess profits taxes paid or accrued within the taxable year, subject to certain limiting rules. Rule A of subparagraph (2) effectively placed all taxpayers on the accrual basis of accounting with respect to the excess profits tax payments described.[2]

The Revenue Act of 1942, by Section 105(c), repealed Internal Revenue Code, Section 23(c)(2), and, simultaneously, restored excess profits taxes to the list of exceptions to the deduction rule permitted by Section 23(c). Thus, the right of deduction formerly accorded to excess profits taxes paid or accrued was withdrawn by the 1942 Revenue Act.

The very same section of the 1942 Revenue Act, which restored excess profits taxes to the list of exceptions to the tax deduction provision, added the new provision—Section 122(d)(6)—to the Internal Revenue Code.

The only pertinent Congressional language is the following:[3]

> "Section 122 of the Code relating to computation of the net operating loss deduction allowed by 122(c) of the Code is amended so as to allow excess profits tax paid or accrued within taxable years (subject to certain rules) as a deduction in computing net oper-

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[2] Rule (A) read as follows: "(A) The deductions shall be limited to the tax imposed for the taxable year but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;"

[3] Senate Report No. 1631, 77th Congress, 2nd Session, page 67, and House Report No. 2333, 77th Congress, 2nd Session, page 65.

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ating loss for, and net operating loss carry over and carry back from, such taxable years."

Rules (A), (B) and (C) in Section 122(d)(6) are almost verbatim copies of Rules (B), (C) and (D) formerly appearing in Section 23(c)(2). Significantly, Rule (A) under the latter section, which had effectively placed all taxpayers on the accrual basis, does not appear as a Rule under Section 122(d)(6). The question thus arises as to the significance of the apparently deliberate omission of Rule (A) of Section 23(c)(2) from the Rules contained under Section 122(d)(6). The maxim, *inclusio unius est exclusio alterius* suggests that the Congress, by the enactment of Section 122(d)(6) omitting Rule (A), did *not* intend to place all taxpayers on the accrual basis.

Can it be validly assumed that by the omission of Rule (A), Congress intended to place each taxpayer upon the basis of its own method of accounting? At first blush, it might appear that such meaning would be in accord with the definition of "paid or accrued" contained in Section 48(c) and hence the deduction would be controlled by Section 43. However, both sections have reference to "net income" and Section 43 refers to "deductions." Technically, neither concept is here involved.

Subparagraph 6 of Section 122(d) as well as the other 5 adjustments under Section 122(d) are all designed to convert net income or net operating loss, respectively, into economic net income, or economic net loss, as the case may be.[4] When Section 122(d)(6) is read in conjunction with Section 122(a), the effect is that a net operating loss becomes economic net loss. The payment of excess profits taxes in 1946 by the taxpayer was a true economic loss to the taxpayer in that year.

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[4] See 5 Mertens, Law of Federal Income Taxation, 305-6, Sec. 29.02.

After a net operating loss (Section 122(a)) has been converted into economic net loss (Section 122(d)), that economic net loss is what is carried back and applied to prior years. When that loss is carried back and converted into a net operating loss deduction (Section 122 (c)), the net income of the year of application itself first must be converted into economic net income. Section 122(c). Thus net income, as such, is *not* ultimately involved either in the loss year or year of deduction. That this distinction between net income and some other statutory concept such as economic net income is not a super-refined legalism is illustrated in a parallel situation involving the distinction between net income and subchapter A net income. Compare *Commissioner v. Clarion Oil Company, supra.*

One other point is significant in this regard. Conventional deductions, as such, are not involved. What is involved is a *tax.* The coming into existence of a liability for a tax is referred to by the word "accrued." The liquidation of a pre-existing tax liability by actual payment is referred to by the word "paid." The heading of Section 122(d) refers to "Exceptions, additions and limitations", not "deductions." The only one of these three words which could be applicable in the computation of a net operating loss where Section 122(d)(6) is involved is the word "additions." This refers to the amount of excess profits taxes "paid or accrued" which are to be *added* to the net operating loss otherwise computed.

The parallel type of situation referred to above, is illustrated by such cases as *Commissioner v. Clarion Oil Company, supra; Birmingham et al, Exrs. v. The Loetscher Company,* (C.C.A. 8 1951) 188 F. (2d) 78; *Aramo Stiftung v. Commissioner,* (C.C.A. 2 1949) 172 F. (2d) 896; *Wm. J. Lemp Brewing Company,* (1952) 18 T.C. ...., No. 70. All of these cases demonstrate that where "net

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income" is not specifically involved, Sections 43 and 48(c) of the Internal Revenue Code are not controlling. They, therefore, also stand for the proposition that in such a case the phrase "paid or accrued" does not refer to accounting methods but rather refers to the liquidation of a tax liability or the coming into existence of such a liability. In these respects, the cited cases closely parallel the present proceeding.

The final reason for the correctness of the Court of Claims decision becomes apparent from a brief consideration of the effect of the petitioner's argument with respect to the proper meaning of the quoted phrases. This will illustrate the inequitable and discriminatory results flowing from the petitioner's construction of "paid or accrued." Fundamentally, every corporate taxpayer regardless of its method of accounting, must file its return within 2½ months after the close of its taxable year. The liability for tax reflected on such return is required to be paid in four quarterly installments during the year following the return year. This is the usual or conventional way in which a corporate taxpayer liquidates its liabilities for tax, regardless of accounting methods. A cash basis corporation, paying its prior year's excess profits tax liability in a loss year would, under the petitioner's theory, always would be entitled to make the Section 122(d)(6) adjustment while an accrual basis taxpayer in the identical situation would not.

If, as contended for by the petitioner, the phrase "paid or accrued" refers to accounting methods then it follows that it is virtually impossible for any accrual basis taxpayer to derive benefit from Section 122(d)(6) in such a situation. While it is mathematically possible it is almost impossible as a practical matter for an accrual basis taxpayer to incur a net operating loss under Chapter I of the Internal Revenue Code, and in the same year incur an excess profits tax liability under Chapter 2E of the

Internal Revenue Code to be accrued. Nearly all corporate taxpayers compute net income on the accrual basis of accounting. They would be foreclosed in a normal situation while the very few cash basis taxpayers would all benefit.[5] It can scarcely be argued that Congress intended such a discriminatory and inequitable result. The taxpayer's interpretation of the words in question, would benefit either a cash basis or an accrual basis taxpayer equally where either had a loss year following a profit year in which an excess profits tax liability arose. It was this basic equitable consideration which apparently weighed heavily in the Court of Claims and induced it to find for the taxpayer.

The Court of Claims chose to premise its findings on the ground that it was necessary to make an exception in this case to the general rule prohibiting the shifting from the "paid" to the "accrued" basis or vice versa. The Court of Claims, in taking that position, did so in order to reach a result giving effect to the plain "intention of Congress."

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[5] There is an unusual type of situation which can also arise. That is where *additional* taxes, deficiencies, are involved. If there is a dispute as to the liability for these additional taxes which postpones accrual and such dispute continues to and is settled in a loss year then, under either party's theory of "accrued," the result would be the same for an accrual basis taxpayer. Compare GCM 25298, 1947-2 Cum. Bull. 39.

If a cash basis taxpayer were involved, and no payment was made in the settlement year then under the respondent's theory there would be no proper Section 122(d)(6) adjustment; under the taxpayer's theory the tax would "accrue" and be a proper adjustment.

If the additional tax liability settled was also *paid* to the Collector in the same year settled, then under either theory Section 122(d)(6) would apply. The payment as well as the settlement would fix the time of accrual under respondent's accounting method theory. *Robert Reis & Co.*, (1953) 20 T.C. — No. 36, and, under taxpayer's theory, both actual liquidation of a liability and the coming into existence of a liability would have occurred.

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There would appear to be another equally valid rationalization supporting the Court of Claims' result which would avoid the necessity of ignoring the rule against shifting bases. That alternative, as contended for by the taxpayer, is that the phrase "paid or accrued" is ambiguous, being susceptible of the two different constructions previously mentioned. In the presence of such ambiguity, the Court of Claims properly exercised its judicial prerogative and resolved the ambiguity, by ascertaining the Congressional intent. That intent was that the taxpayer should be permitted to carry back a net operating loss to a former year, and that to this loss there should be added excess profits taxes "paid or accrued" in the loss year. As previously shown, the payment of an excess profits tax is an economic loss, which increases the loss permitted to be carried back under Section 122(d)(6).

III

THERE IS NO CONFLICT OF DECISION

The petitioner here makes the point that the decision of the Court of Claims involving this taxpayer is directly in conflict with certain decisions of the Tax Court of the United States. That being so, such a situation does not create that kind of a conflict in which this court normally grants a *writ of certiorari*. Nowhere in this Court's Rule 38(5) is there any reference to a conflict between the Court of Claims and The Tax Court of the United States. The latter court is, of course, only an administrative agency, a part of the Executive Branch of the Government. *Edward D. Whitehead v. U. S.*, decided January 13, 1953, Court of Claims No. 49572.

While it is clear that a *writ of certiorari* can issue where there is a direct conflict of decisions between a Court of Appeals and the Court of Claims, *Helvering v.*

the International Life Insurance Company, (1935) 294 U.S. 686, 689, the respondent has been unable, despite diligent search, to find a single case in which a conflict between the Tax Court of the United States on the one hand, and the Court of Claims or a Court of Appeals on the other has resulted in the issuance of a *writ of certiorari* by this Court.

The Circuit Courts of Appeal, and the United States Court of Appeals for the District of Columbia have exclusive jurisdiction to review decisions of the Tax Court of the United States. Title 26 U.S.C., Section 1141. There is a theoretical possibility in the future that a *bona fide* conflict might develop, which might warrant an exercise of this Court's discretion in issuing a *writ of certiorari.* That might occur should the taxpayers against whom decisions were rendered in the Tax Court involving Section 122(d)(6) appeal to some Circuit Court of Appeals and that court sustained the Tax Court. However, an attempt at this time to invoke the authority of this Court appears to be premature.

Even if it be assumed that the conflict between the Tax Court of the United States and the Court of Claims is that kind of conflict in which *certiorari* may issue, then that fact, in and of itself, does not warrant the inevitable conclusion that this court must grant *certiorari.* See *Robert L. Stern, Denial of Certiorari Despite a Conflict, Harvard Law Review,* January, 1953.

This proceeding does not involve that kind of matter in which the Court of Claims has exclusive jurisdiction over some unique type of statutory proceeding. Tax matters are certainly not unique, and the Court of Claims does not have exclusive jurisdiction thereof.

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IV

THERE IS NO IMPORTANT ISSUE INVOLVED

The petitioner states (p. 5), that it is informed by the Treasury Department, that the same issue is presented in at least 35 (and probably more) other cases, now pending before various courts and the Treasury Department, involving $27 million in taxes, plus interest. Aside from the fact that this unsupported allegation should receive no consideration, it seems clear that under this court's previous decisions, such facts, even if true, do not furnish adequate grounds for *certiorari*.

Where large amounts of money are involved, such a fact may be persuasive for *certiorari* although normally not so unless the amount is enormous. See *U. S. v. Zazove*, (1948) 334 U. S. 602, 613-14, Note 17. The principle at issue in that case could have involved billions of dollars. The number of individuals affected by a decision may be persuasive. One example of this type of situation is *Patterson v. Lamb*, (1947) 329 U. S. 539. In that case thousands of World War I draftees were directly affected. There is in this case no such pressure of equity.

Where a lower court's decision is at variance with well established administrative construction, *certiorari* may issue. *U. S. v. Ruzicka*, (1946) 329 U. S., 287. There a review was granted where a lower court's decision upset 25 years of consistent rulings and practice by the War Department. Here there is no well established administrative construction such as existed in the case cited.

If the Court of Claims decision be assumed to be in error as a matter of law, then that fact alone would not warrant the issue of the writ. This Court is not primarily concerned with the correction of errors in lower

court decisions. Hence, it generally will not grant *certiorari* just because the decision below may be erroneous. See *Supreme Court Practice,* Robert L. Stern, Eugene Gressman, Bureau of International Affairs, Inc., 1950, p. 113.

Section 304(e) of the Excess Profits Tax Act of 1950 made Internal Revenue Code Section 122(d)(6) inapplicable with respect to taxable years ending after June 30, 1950. Therefore, the present issue is not a recurring one and can involve only the years ending prior to June 30, 1950. The significance of the highly technical issue here involved has only a comparatively narrow scope even in its broadest implications.

CONCLUSION

For the reasons above stated, the petition for *writ of certiorari* to the United States Court of Claims in this proceeding should be denied.

Respectfully submitted

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Counsel for the Respondent

Of Counsel:
Fred R. Tansill

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• APPENDIX

Internal Revenue Code:

Sec. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

(c) TAXES GENERALLY.—

* * *

"(2) Excess-profits tax under Chapter 2E—special rules.—For the purposes of this subsection, in the case of the excess-profits tax imposed by Subchapter E of Chapter 2—

"(A) The deduction shall be limited to the tax imposed for the taxable year, but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;

"(B) No reduction in such tax shall be made by reason of the credit for income war-profits or excess-profits taxes paid to any foreign country or possession of the United States;

"(C) Such tax shall be computed without regard to the adjustments provided in section 734; and

"(D) Such tax, in the case of a consolidated return under section 730, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary."

(Effective under Sec. 205 of the Revenue Act of 1941, for taxable years beginning after December 30, 1940. Repealed by Sec. 105(c)(2) of the 1942 Revenue Act, effective for taxable years beginning after December 31, 1941.)

* * * *

Sec. 43 [as amended by Sec. 134 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting

upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death. (26 U.S.C. 1946 ed., Sec. 43.)

Sec. 48. DEFINITIONS.

When used in this chapter—

* * * *

(c) "Paid or Incurred," "Paid or accrued."—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * *

(26 U.S.C. 1946 ed., Sec. 48.)

Sec. 122 [as added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) [as amended by Sec. 105 (e) (3) (A) of the Revenue Act of 1942, *supra*] Definition of Net Operating Loss.—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 153(a) of the Revenue Act of 1942, *supra*] Amount of Carry-Back and Carry-Over.—

(1) Net operating loss carry-back.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first

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preceding taxable years shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * *

(c) [as amended by Secs. 105(e)(3)(B) and 153(b) of the Revenue Act of 1942, *supra*] Amount of Net Operating Loss Deduction.—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d)(1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e));

(d) [as amended by Sec. 105(e)(3)(C) of the Revenue Act of 1942, *supra*] Exceptions, Additions, and Limitations.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * *

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * *

(26 U.S.C. 1946 ed., Sec. 122.)

Sec. 505. SUBCHAPTER A NET INCOME.

For the purposes of this subchapter the term "Subchapter A Net Income" means the net income with the following adjustments:

(a) Additional Deductions.—There shall be allowed as deductions—

(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 500, or a section of a prior income-tax law corresponding to either of such sections.

* * * *

(26 U.S.C. 1946 ed., Sec. 505.)

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